

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Nico Coty Toscani,)	Case No. 8:12-cv-03244-MGL-JDA
)	
Plaintiff,)	<u>REPORT AND RECOMMENDATION</u>
)	<u>OF MAGISTRATE JUDGE</u>
)	
v.)	
)	
Dr. Paul C. Drago; Dr. John B. Mcree;)	
Dr. John B. Tomarchio; Warden Willie)	
Eagleton; Major West; RN Linda C. Tyler;)	
Nurse Krystal S. Hill; RN Kelly M. Morton;)	
HCA Amy L. Smith; RN Patricia D. Perry;)	
CCC Michele D. Fox; RN Lisa Neely;)	
Sgt. Gaddy,)	
)	
Defendants.)	
)	

This matter is before the Court on a motion to withdraw Defendant Dr. John B. Tomarchio filed by Plaintiff. [Doc. 28.] Plaintiff is proceeding pro se and brings this civil rights action pursuant to 42 U.S.C. § 1983. [Doc. 1.] Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(d), D.S.C., this magistrate judge is authorized to review all pretrial matters in cases filed under 42 U.S.C. § 1983 and to submit findings and recommendations to the District Court.

APPLICABLE LAW

Liberal Construction of Pro Se Complaint

Plaintiff brought this action pro se, which requires the Court to liberally construe his pleadings. *Estelle*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978); *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). Pro se pleadings are held to a less stringent standard

than those drafted by attorneys. *Haines*, 404 U.S. at 520. Even under this less stringent standard, however, a pro se complaint is still subject to summary dismissal. *Id.* at 520–21. The mandated liberal construction means that only if the court can reasonably read the pleadings to state a valid claim on which the complainant could prevail, it should do so. *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999). A court may not construct the complainant’s legal arguments for him. *Small v. Endicott*, 998 F.2d 411, 417–18 (7th Cir. 1993). Nor should a court “conjure up questions never squarely presented.” *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

Motion to Dismiss Standard

Under the Federal Rules of Civil Procedure, a plaintiff may request the court to dismiss his action. Fed. R. Civ. P. 41(a)(2). The court may dismiss the action “on terms that the court considers proper.” *Id.* Unless the court orders otherwise, dismissal of an action at the plaintiff’s request is without prejudice. *Id.*

DISCUSSION

On February 5, 2013, Plaintiff filed a motion to withdraw Defendant Dr. John B. Tomarchio (“Tomarchio”) [Doc. 28], which the Court has construed as a motion to dismiss Tomarchio. At this stage in the proceedings, all Defendants, including Tomarchio, have been served and have filed an Answer. [Docs. 22, 24.] No dispositive motions are pending; dispositive motions are due from Defendants by March 1, 2013 [see Doc. 14 at 3 (setting deadline for dispositive motions as 45 days after an answer is filed)]. Therefore, the Court concludes there would be no prejudice to Defendants to dismiss Tomarchio at this early stage of the proceedings.

CONCLUSION

Wherefore, based upon the foregoing, the Court recommends Plaintiff's motion to withdraw Dr. John B. Tomarchio [Doc. 28] be GRANTED.

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin
United States Magistrate Judge

February 6, 2013
Greenville, South Carolina